

ANPR for Bunk Beds
FR Docket No. 98-1457, 63 FR 3280

Comment of an Interested Person Regarding Mandatory Bunk Bed
Performance Standards

As noted above, the Consumer Product Safety Commission has requested comments concerning the possibility of requiring bunk beds sold in the United States to meet performance standards intended to prevent deaths arising from entrapment. I disagree with this proposal requiring bunk bed manufacturers to produce beds meeting a certain performance standard but agree that the entrapment death issue must be addressed. It is my opinion that effective measures, far short of promulgating a mandatory performance standard, can be taken and will restrict the industry much less. The end result of such measures would be fewer entrapment deaths and little or no added cost to the bunk bed manufacturer or consumer.

My understanding of the goal of the proposed rulemaking is that the rule would seek to greatly reduce and even eliminate, if possible, entrapment deaths occurring on bunk beds. I agree with this goal and believe that due to loss of life, governmental intervention is necessary. However, I feel that the advance notice of proposed rulemaking has provided only part of what the goal should be. The advance notice has failed to consider how the industry and the consumer will be affected by the costs and ineffectiveness of a rule requiring mandatory safety standards. The proposed rule should also have the goal of placing as little added cost on the manufacturer and consumer as possible.

Although increased safety and little added cost seem to be competing interests, I believe that safety can be increased merely through educating the consumer about the associated risks of using bunk beds. Educating the consumer can be a much less costly alternative and can be much more effective as well. This result is apparent when considering the effects of mandatory bunk bed labeling as to proper use and suggested occupant age limitations. Once the shortcomings of a mandatory performance standard are factored in, the alternative becomes the better choice.

The performance standard approach assumes that a mandatory standard will actually reduce entrapment deaths. Purely accidental entrapments may be less likely with the extra safety features resulting from a mandatory performance standard. However, the advance notice completely ignores the fact that misuse of bunk beds occurs and possibly creates much of the problem. Adding safety features will not reduce the misuse of bunk beds. In fact, extra safety features added to products often have the effect of giving the consumer overconfidence in the product, thereby encouraging misuse. Examples include the addition of anti-lock brakes and airbags to automobiles. Drivers still misuse their automobiles and probably even take more risks (i.e. drive faster and do not wear safety belts) because they assume they are safer. The same would occur for consumers purchasing bunk beds. Parents would not feel the need to supervise their children as closely in bunk beds that are

"certified" under a performance standard. Children can climb over two, three, or four rails just as easily as they can climb over one. Nothing short of straightjackets could prevent children from misusing bunk beds. Therefore, parents must be made aware that their children are at risk when on or around a bunk bed.

Simple high-school physics shows that bunk beds are inherently more dangerous than normal beds, and the consumer product safety commission must realize that no amount of safety standards can idiot-proof anything. Therefore, only two extremes for performance standards exist that would actually result in safer bunk beds. One extreme would completely prohibit bunk bed manufacturing from occurring. No bunk beds equals no entrapment deaths. Obviously, this would be the most restrictive rule. Bunk beds benefit society and outlawing them certainly is not the answer. The other extreme would be some form of barrier that completely blocks the occupant of the bed from access to areas of danger. This blockade was referred to above as a straightjacket in the case of a child. No consumer would buy such a product. No performance standard short of either of these two extremes could prevent entrapment deaths because misuse can otherwise occur. Misuse must be addressed and no matter how extensive, a mandatory performance standard cannot adequately address misuse.

The proposed standards themselves are not provided in detail in the advance notice, but I recall that the major requirements are an extra safety rail as well as longer rails extending nearly

from end to end. As mentioned, some accidental deaths, such as those caused by one's motion while asleep, might be prevented. Still, these extra rails will not prevent a child or adult from purposefully climbing over or under the rail or rails and becoming pinned. Entrapment deaths may not always involve misuse. However, the advance notice admits that some of the entrapment deaths occurred on beds that did conform to the voluntary standard, and some, if not all, of those entrapment deaths involved misuse. 63 FR 3280, 3282. A performance standard cannot eliminate death due to entrapment resulting from misuse.

I consider misuse to include not only the actions of the occupant while using the bunk bed, but also the action of a parent providing a child access to a bunk bed when that child is not mature enough to properly use the bunk bed. The advance notice reports that 96 percent of the entrapment death victims were 3 years old or younger. Id. I think one should question whether a bunk bed, under any circumstance, is safe for a child at that age. Perhaps the best course of action is to inform parents that bunk beds are not suitable for children under a certain age. Mandatory labeling could easily achieve this task and then parents have the capability to prevent 96 percent of all bunk bed entrapment deaths. Bunk bed manufacturers would not sustain a heavy burden since those choosing to buy bunk beds would still do so but would delay the purchase for a few years. Toy manufacturers provide notification of suggested age

limitations, and it seems to work well for them.

Mandatory labeling of bunk beds as to proper use including the occupant's minimum age will significantly reduce the entrapment death rate and will not restrict the market. Placing information on the bed's container, in the bed's documentation, in the advertisements for the bed, and on the bed itself would create very minimal costs for the manufacturers relative to the costs associated with redesign and added structural components. According to the statistics in the advanced notice, parents could virtually eliminate entrapment deaths by waiting until their children reach the age of four before using bunk beds. The mandatory labeling would permit parents to make such decisions. Both aspects of the goal set forth above would then be accomplished.

Forcing manufacturers to redesign and add safety features to their bunk beds would not accomplish either aspects of the goal. Young children would still have access to the beds. Parents would provide less supervision due to the illusory peace of mind provided by the mandatory standard, and the children would find ways to misuse the bed. Entrapment as well as hanging and falling would still occur due to the misuse, and both the manufacturers and the consumers would be burdened by the added costs of the safety features.

One alternative that attempts to tackle misuse head-on is to provide notification of proper use and age limitations in labeling, but this alternative can be expanded. A voluntary

standard already exists so the manufacturers could also be required to state in the labeling whether or not their bunk beds meet the voluntary standards. Due to the prevalence of entrapment deaths in those 3 years old and younger, the labeling should contain the age limitation regardless of whether it contains the notice of meeting the voluntary standard. This requirement would prevent parents of very young children from becoming overconfident in their child's safety due to the standard. Also, parents could make an informed decision as to whether to delay the use of a bunk bed even if it did meet the standard.

The alternative of mandatory labeling meets all of the reasons provided for the performance standard as stated on page 3283 of the advanced notice. Requiring the labeling would raise the awareness of the manufacturers. Fines could be issued and publicized for noncompliance. State and local officials could assist in identifying nonconforming beds. Retailers and distributors could be held in violation for selling nonconforming beds. If the labeling was required to indicate whether the voluntary standard was met or not, the playing field would be leveled for all manufacturers. Consumers will realize that the more expensive beds meet the standards and can then do their own cost-benefit analysis before purchasing. U.S. Customs can check for the proper labeling on imported beds. The labeling requirement could include manufacturer identification. The labeling could also indicate that meeting the voluntary standard

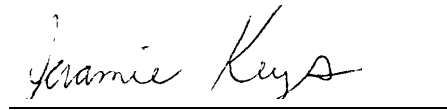
does not guarantee an accident-proof bed.

The choice of statutory authority for the labeling requirement would not be an issue because the confusion addressed in the advance notice is eliminated. Since all bunk beds would require labeling of the occupant's minimum age, the Federal Hazardous Substance Act could be used to regulate all bunk beds regardless of the targeted age. Therefore, the Consumer Product Safety Act would not be needed for "adult" beds because they would have to be labeled for minimum age the same as "children's" beds, and the minimum age for "adult" beds would probably be considered a child's age. Support for this assertion appears in the advance notice which states that children's beds would be those having mattresses smaller than twin-size. 63 FR 3283. Since an adult bed would then have twin-size and larger mattresses, a child around the age of 10 could sleep safely on a bunk bed designed for an adult. The labeling would still fall under the FHSA since it would suggest that occupants be at least 10 years of age and 10 year-olds are considered children.

As I stated earlier, death due to entrapment must be addressed and can be rectified. However, mandatory performance standards are too costly and ineffective. Mandatory labeling as to proper use, including the minimum age for the occupant, is inexpensive and setting the minimum age to at least four years old may eliminate as much as 96 percent of all entrapment deaths. Hopefully, the proper use instruction can reduce the remaining 4 percent by eliminating other types of misuse such as improper

supervision.

Respectfully submitted,



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Consumer Product Safety Commission
'16 CFR Chapter II
63 FR 3280

COMMENT REGARDING PROPOSED RULES OF THE CONSUMER
PRODUCT SAFETY COMMISSION CONCERNING MANDATORY
SAFETY GUIDELINES FOR BUN-K-BEDS

This comment addresses the proposal to create a mandatory standard for bunk-beds. (63 FR 3280; FR Doe. 98-1457). I am a law student at the University of Tennessee with an interest in administrative law and this issue. I believe that a mandatory standard is necessary. Although I commend the industry for having a voluntary standard, continued deaths and injuries show that the reach is not broad or effective enough. More must be done to force all bunk-bed manufacturers into compliance.

Although government regulation falls in and out of favor with the American public, regulations concerning safety are often well received. I realize that public opinion sometimes prefers government agencies to let industries regulate themselves. Often businesses, the economy, and the **like** can be depended on to solve problems such as the one presented here. However, in this situation it appears that the Consumer Product Safety Commission (CPSC) is the best parry to take control and regulate a solution to the problem. The industry has had its chance at self-regulation. I do not believe the commission will get an overwhelming amount of bad press or public outcry for trying to protect children.

I feel that mandatory standards for bunk-beds set out by the CPSC is the best answer to the problem of deaths by entrapment for several reasons. First, the bunk-bed manufacturing industry has been creating voluntary standards since 1978 and deaths are still

occurring. (ANPR, background, 328'1). Although the industry argues that there is substantial compliance with the voluntary standards, studies by the Commission and newspaper accounts regarding these accidents show that there are still many bunk-beds on the market which fall below the standard. (ANPR, Compliance with the Existing Voluntary Standard, 3282; The Des *Moines Register*, "Learning from Tragedy," March 3, 1998). The industry has had ample time to prove its ability to remedy this problem and has failed.

Arguably, small manufacturers will always be able to avoid following a voluntary standard. This could be because of ignorance, they may very well be unaware of any standards or problems caused by bunk-beds, or it could be a cost related choice. Whatever the case, mandatory regulations are probably the only tool which will reach all businesses that make bunk-beds. Although the industry might argue that such manufacturers are only a small part of the market, I am sure that the families of a child injured or killed by a bed made by a local manufacturer would view them as significant. Parents and children should be secure in the furniture that is purchased to put a child to sleep in.

Voluntary standards by the industry are not very coercive to these small producers of bunk-beds. Cost increases have a much more significant impact on local manufactures than national producers of bunk-beds. Furthermore, identifying all the manufacturers of bunk-beds is not easy; the beds are very easy to assemble. The Commission, however, has many more resources through which to **identify** the manufacturers and maintain compliance. The Commission's ability to impose penalties is a **powerful** tool towards obtaining total compliance, which supporters of a voluntary standard can never utilize.

Some may argue that such regulations will severely hurt or even put out of business the small or regional chain. This could be true depending on the percentage of their business that is supported by bunk-bed sales. However, the costs of bringing the beds into compliance, which will be reviewed later, does not appear to be significant. These small manufacturers should still be able to compete because of their accessibility and local reputation.

Second, I feel that the Commission is the best qualified to gather data from all the accidents and determine the best standard. The industry, at the moment, pushes for a three inch (between the guard rail and bed frame as well as the head and foot board) standard. However, there have been a few deaths in beds that meet this standard. (ANPR, Incident Data, 3281). A more restrictive standard may be necessary. If that is the case the Commission, is more qualified than the industry to determine what the standard should be as they should have all parties best interests in mind. The Commission should carefully study the accidents as well as the costs and benefits that would be the result of a mandatory standard. The fact that more than 500,000 beds representing forty-one manufacturers has been recalled by CPSC since 1994 speaks volumes. (*The Des Moines Register*, "Learning from Tragedy, March 3, 1998). The industry does not appear to be serious about meeting these standards.

The Commission has done some preliminary estimation of the cost and benefits of a mandatory standard. The CPSC estimates that the cost increase will be \$15 to \$40 per bed. (ANPR, Cost / Benefit Considerations, 3283). This does not seem like much to save the life of a child which should help in gaining public support for regulation. Furthermore, I

believe that most consumers, once warned of the dangers associated with bunk-beds, would be happy to pay a little extra for the safety of their children. Perhaps the bunk-bed industry should consider the savings of a reduced number of recalls once a mandatory standard is in place.

A mandatory standard will also greatly reduce the problem of unfair competitions when all manufacturers are forced to raise prices across the board. Apparently, some bunk-bed producers have ignored the voluntary standard, thereby cutting their costs and undercutting competitors in pricing. Unfair competition can occur with a voluntary standard but should not happen without penalties if there is a mandatory standard.

The Commission has also expressed concern over bunk-beds being imported that do not meet the voluntary standard. Obviously, a business from a foreign market has little reason to bring their beds into compliance with a voluntary standard issued by an American manufacturing association. A government regulated, mandatory standard, which could keep non-complying beds from making it through customs, is the only way to force foreign competitors to produce safe beds and compete on an equal playing field with American furniture manufacturers.

I believe that the best way to enforce a mandatory standard for bunk-beds is through penalties. Penalties will help ensure compliance and hopefully make the public aware of the dangers associated with bunk-beds. To be effective the penalties should be substantial, not just a slap on the wrist. I believe the penalty for a bunk-bed that does not meet a mandatory standard needs to be more than what it would cost to bring the bed in line with regulations.

If it is not, some companies will be **tempted** to ignore regulations because they are still making more money than competitors.

In order to make the regulations even more powerful, I would go a step further and fine retailers who sell beds that do not meet the mandatory standard. Fining retailers should provide for more public education in that consumers comparing prices may be informed by furniture salespeople about the standard and why their store will only sell **bunk-**beds that meet the regulations. Retailers, in fear of fines, should greatly reduce the market for bunk-beds which do not meet a mandatory standard.

I would also encourage the regulation, at least at some level, of adult bunk-beds. In my experience, children **often** see bunk-beds, whether made for adults or children, as a toy. The bunk-bed is sometimes used like a jungle gym by children. People who purchase these beds for adult use should be aware of the dangers they pose for children. I would suggest that there be, at the least, some sort of warning printed in a noticeable place on the beds about the dangers of entrapment, hanging, and the like.

As an alternative or in addition to a mandatory standard, I would recommend the regulation of noticeable warning on all beds. People purchasing bunk-beds deserve to know the dangers and precautions that should be taken. Apparently, children under six should not be allowed to sleep or play on the top bunk. A parent whose 3 year old died by hanging **from** a bunk bed, after being **left** for a nap on the top bunk, claimed to have never been warned of this danger. (*Newsday*, "Regulating Bunk-Beds / Agency Considers Mandatory Limits," March **1**, 1998). Manufacturers know that bunk-beds are purchased primarily by large families to consolidate space or people who want their children to have extra sleeping

space for friends. I have no problem holding manufacturers of bunk-beds to a higher standard to protect these children and their parents from enduring such a horrible tragedy.

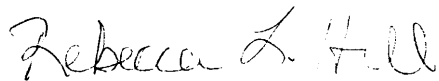
The bunk-bed industry may argue that there will never be a perfect bunk-bed and that accidents will still happen. Obviously, this is true. It is the Commission's, as an agency of the government, responsibility to make sure that all that can be done is being done to protect children. Clearly, parents also have an important role in reducing deaths and accidents. There will always be parents who, sadly, will not take this obligation seriously.

I believe that a public education campaign that goes hand-in-hand with the introduction of a mandatory standard will reach those parents and caregivers who seek to fulfill their obligations to children. A successful public education campaign might begin with a press conference announcing the new standard, which will hopefully garner newspaper and media coverage. Furthermore, public service announcements might be used. If penalties are used as an enforcement tool, publicity about the first imposition of these will also inform the public about the risk of harm to children. The money earned from the penalties could be used to fund public education,

In conclusion, I whole-heartedly support the enactment of a mandatory standard for bunk-beds made and sold in the United States. I feel that this is a problem that will not be resolved without government regulation and believe that the Consumer Product Safety Commission is the best agency or organization to determine what the standard should be. Furthermore, I believe that public opinion would be behind such a regulation as most parents and society in general strive to take care of our children. They deserve a safe place to grow up and with all the dangers they face should not need to worry about being

entrapped in the place they lay their head at night. Additionally, I support the regulation, at least in the form of a warning, on adult beds as well because bunk-beds are in many ways an attractive nuisance. Penalties will be the most effective way of enforcing a mandatory standard and their proceeds could go to a continuing public education campaign. I believe that the mandatory standard will greatly reduce accidents and deaths caused by entrapment in bunk-beds.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Rebecca L. Hill".

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DEPARTMENT OF CONSUMER PRODUCT
SAFETY COMMISSION
63 FR 3280

COMMENT OF MICHAEL T. CABAGE REGARDING THE
MANDATORY ADOPTION OF SAFETY STANDARDS FOR BUNK BEDS

This comment will address the proposed decision of the Consumer Safety Commission to mandate a rule with the intention of reducing bunk bed injuries. Notice of Proposed Rule Making, 63 Fed. Reg. 3280 (January 22, 1998). Currently, the Consumer Safety Commission has in place a voluntary industry standard regarding the safety of bunk beds. The proposed rule would make a mandatory standard regarding the safety features of bunk beds. The purpose of such a standard is to insure compliance by industry and to decrease the number of fatalities and injuries caused by the widespread use of bunk beds. The law for this proposal would come from the Consumer Product Safety Act under CPSA section 3(a)(1), 15 U.S.C. § 2052(a)(1) (1994). The Consumer Safety Commission should adopt this rule because it would prevent further death and injury among the nation's youth by insuring a level of compliance with safety measures that could not be achieved under the voluntary standard. Moreover, the mandatory standard would aid the economic interests of the nation as a whole from foreign competitors.

The original guideline was published in 1979 as a manual regarding the safety requirements of bunk beds and was intended to be used by industry voluntarily. This guideline was updated in 1981 and again in 1986. Also in 1986, the Consumer Federation of America ("CFA") filed a petition arguing that the voluntary standards did

not sufficiently address three safety risks: inadequate mattress supports, entrapment between the guardrails and the mattress, and entrapment between the bed and the wall. 63 Fed. Reg. at 3281. Since 1986 several revisions to this voluntary standard have been made, and it now includes suggestions regarding entrapment, warning labels and information, and the identity of the manufacturer. Id.

The continued death and lack of compliance to this voluntary standard have caused the Consumer Product Safety Commission (CPSC) to request a mandatory standard to insure compliance. Since 1990, bunk bed incidents have killed eighty five children. Id. The incidents have not decreased in recent years, and the majority of deaths continue to be caused by entrapment. Id. All but three of the entrapment deaths involved beds that did not comply with the voluntary standard. Id. at 3282. The industry estimates that five hundred thousand bunk beds are sold in the United States for residential use yearly with the sale number being stable over time. Id. The value of these beds is estimated at around one hundred and fifty million dollars. Id. The average individual cost is three hundred dollars. Id. Out of one hundred and six bunk bed manufacturers only forty comply with the voluntary standard. Id. These forty compose around eighty percent of the total market share. Id. Due to a lack of compliance with the standard, over five hundred thousand bunk beds have been recalled since 1994. Id. This continued noncompliance, especially by smaller companies, has caused the CPSC to request a mandatory standard. Id.

The CPSC hopes a mandatory standard will increase compliance by creating a sense of urgency. Id. at 3283. It also would allow penalties to be collected from nonconforming manufacturers, and would make nonconforming punishable by law. Id. The Commission also hopes to create a level playing field by removing the competitive cost advantage for nonconforming manufacturers versus conforming manufacturers. Id. The new standard would also help prevent noncomplying foreign manufacturers from entering their unsafe products into the American market. Id. The addition of

requiring manufacturers to print their identities on their beds would help increase the effectiveness of recall orders. Id. Industry has estimated that “the cost of bringing bunk beds into conformance with entrapment requirements range from fifteen to forty dollars per bed.” Id. The increased cost would be born only by companies that do not comply with the standard now, and the Commission estimates the cost of upgrading bunk beds would be equal to or less than the cost of the current number of deaths caused by entrapment in bunk beds. Id.

The CPSC has concluded that the appropriate authority for regulating bunk beds be under either the Federal Hazardous Substances Act, which deals with hazards to children, or the Consumer Product Safety Act, which deals with hazardous products used by either children or adults. Id. The best avenue of attack for this proposed rule would come under the Consumer Product Safety Act because this act has a broader scope, covering both adults and children. CPSA section 3(a)(1), 15 U.S.C. § 2052(a)(1) “authorizes the regulation of unreasonable risks of injury associated with ‘consumer product,’ which includes bunk beds.” Id. There is a catch under the CPSA because “section 30(d) of the CPSA, however, provides that a risk associated with a consumer product that can be reduced to a sufficient extent by action under the FHSA can be regulated under the CPSA only if the Commission, by rule, finds that it is in the public interest to do so.” Id. The CPSC has proposed that making the rule under the CPSA would avoid confusion over which act was responsible. Id. This seems logical, but I would also add that it would be in the public interest to protect adults from injury or death from bunk beds even if the chances are smaller than injury to children. Many adults in college use bunk beds, and they deserve the same protection as children.

“The Commission may not issue a standard under the CPSA . . . if industry has adopted and implemented a voluntary standard to address the risk, unless the Commission finds that ‘ (i) compliance with such voluntary standard is not likely to

result in the elimination or adequate reduction of such risk of injury; or (ii) it is unlikely that there will be substantial compliance with such voluntary standard.” Id at 3284. So the question remains whether the Commission can issue the mandatory standard since many companies already comply with the voluntary standard. The legislative history suggests that substantial compliance would reduce the danger to where the risk is no longer unreasonable. Id. The Commission’s logic in reaching this point should withstand judicial examination. The unreasonable risk of injury would be reduced from fifty four entrapment deaths resulting from beds that did not comply with the voluntary standard to three deaths which occurred in spite of compliance. There have been five hundred thousand recalls in the past four years of beds that did not meet the voluntary standard. These recalls should be more than enough to prove that the industry is not substantially complying with the voluntary standard. If the industry had adequately complied with the standard some fifty children would be alive today. The resulting deaths and injuries are further compelling proof that the industry is not complying with the standard. The fact that the majority of manufacturers are meeting the standard should not be the test since such a large number of products do not meet the standards. These substandard products’ produced by the minority of manufacturers are killing on average some ten children a year from entrapment. Id at 3281. This clearly cannot be called compliance, and this can no longer be tolerated. Therefore, the industry is not meeting the compliance guidelines and the Commission can issue a mandatory standard as provided by statute.

The Commission should transform the voluntary standard into a mandatory standard for the entire industry. This action would save the lives of almost ten children a year. Their young lives are enough to justify the change. Society can no longer tolerate the death of children caused by shoddy products. A minority of manufacturers are producing a substandard product that is killing children for a profit of a mere fifteen to forty dollars a bed. For a small economic advantage these small companies are

killing children with their shoddy products. Companies are liable for the damage their products cause, and here they are causing deaths. The mandatory standard should be adopted to protect the lives of the children killed by substandard products. The enforcement of this standard on all of the industry would save lives, and therefore, the standard should be adopted. The noncompliance with the new standard would be cause for liability, and this will cause the entire industry to comply with the standard to avoid the enormous costs of wrongful death lawsuits that result from their shoddy products.

The question remains what economic cost are we as a society willing to pay to save a life, whether it is an adult or a child's life? In this situation, the resulting economic costs are small, and therefore inconsequential in comparison to the lives lost. With an additional fifteen to forty dollars per bunk bed society can all but eliminate accidental death and injury from entrapment with bunk beds. This cost is quite small per bed. In fact, most bunk beds have this cost already factored into the price of the bed since the majority of bunk bed manufacturers already comply with the safety standard. The new standard would simply level the economic playing field between those companies who comply and those who do not comply with the safety standards. If we do not mandate the safety standards, we are in effect subsidizing these smaller companies to manufacture shoddy products that result in the needless and avoidable death and injury of our children. If the standard is mandated, it would eliminate the economic advantage of producing unsafe bunk beds. This would protect our children and would be an economic justice to the companies who already pay to comply with the safety standard. Perhaps the larger companies are trying to consolidate their market position by driving out the smaller competitors. This is not a problem for the public since there are over forty large manufacturers of bunk beds, and therefore, there is little or no risk of monopolizing the industry and causing the increase of price to the public over the long term. The idea of capitalism is to build the

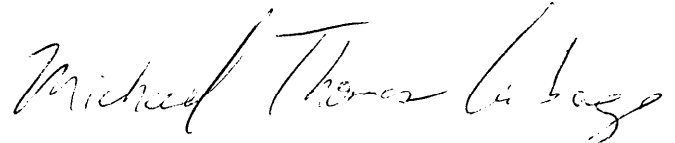
better mousetrap and /or decrease cost so that profit results from an invention. What we have here is a group of individuals who make a cheaper in cost mousetrap that is also cheaper in quality which results in the loss of human life. Therefore, by issuing a mandatory standard the Commission is not tampering with the concept of capitalism. It is saving lives and making the economic field level. There will be some opposition to this proposal by those who do not comply with the standard. This should not be a major problem, however, since the large majority of manufacturers already comply with the standard. These tend to represent the largest companies with the most political and economic power in the industry. Thus, there should little opposition from politicians with affected constituencies. It would also be hard for politicians to argue that these nonconforming companies should be able to produce a cheaper product by fifteen to forty dollars that results in the loss of human life when the majority of manufacturers spread the cost to their customers to comply with the standard and save numerous children from death each year.

The economic advantage for American industry competing with foreign companies should not be overlooked. The foreign companies are generally producing a cheaper product by sacrificing American lives. If they were forced to comply with these standards it would not only save American lives but also the lives of non-Americans since it would be easier and cheaper to produce one product for world wide consumption. The adoption of the standard would also significantly benefit American industry as a whole. I am reminded of a story about the American car industry's response to the air bag in the seventies and eighties. Instead of implementing air bags which Americans could do much better than Japanese competitors who were capturing the American domestic market, the American car manufacturers refused to adopt the air bag. Had they adopted the air bag they would have protected their market share from the Japanese assault for several years. This implementation not only would have kept them competitive versus the Japanese, it

also would have saved numerous American lives in the interim period that dragged on for several years. Similarly, the adoption of this mandatory standard for bunk beds would not only save American lives every year, but will also help preserve American jobs by giving them a competitive economic advantage over foreign competition. No longer will foreign companies be able to produce cheaper products that cost American lives and jobs.

Therefore, the Commission should adopt the mandatory standard to apply to all manufacturers of bunk beds to save lives and remove the economic competitive advantage from companies producing products that kill children every year.

Respectfully submitted,

A handwritten signature in cursive script that reads "Michael Thomas Cabage". The signature is written in black ink and is positioned above the printed name and address.

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**Consumer Products Safety Commission
Advance Notice of Proposed Rulemaking and
Request for Comments and Information
Bunk Beds
63 Fed. Reg. 3280 (January 22, 1998)**

**Comment Regarding the Imposition of Mandatory Safety Standards
for the Manufacture of Bunk Beds for Consumer Use**

This comment will address the proposal to impose mandatory safety standards for the manufacture of bunk beds for consumer use. The Consumer Products Safety Commission (“CPSC”) believes that an unreasonable risk of injury or death exists when bunk beds are constructed in such a way that children in the upper bunk may become entrapped in the bed’s structure. Voluntarily adopted safety standards that address and attempt to remedy these risks are currently in place in the industry. The CPSC, however, appears concerned with these standards, specifically with the voluntary nature of these standards and the lack of meaningful opportunity for enforcement of those standards. To ensure uniform application and adoption of safety standards by manufacturers of bunk beds, the CPSC has proposed implementing mandatory safety standards to replace the voluntary safety standards currently in place in the industry. It is hoped that the mandatory nature of such standards would encourage manufacturers to adhere to safety standards in the design and manufacture of bunk beds, both through improved notice of those standards to manufacturers and through the threat of criminal sanctions for failure to manufacture bunk beds that comply with those standards.

While I applaud the desire of the CPSC to eliminate the risks of death and injury to small children, any effort to eliminate these risks through regulation should be reasonably calculated to achieve this goal. Imposition of a mandatory standard upon the bunk bed manufacturing industry for the construction of bunk beds, in the form proposed in the Advance Notice of Proposed Rulemaking dated January 22, 1998, however, will not achieve this goal. Those manufacturers that comprise the bulk of the market for bunk beds already adhere to the voluntary safety standards in place in the industry. Since no one is breaking the rules, the making of a new rule would have little or no effect. Enforcement of the mandatory standard would then be directed against smaller manufacturers, foreign and domestic, that periodically enter and exit the market. Inspections and recalls against these manufacturers have had little effect, both because of the insignificant share of the market made up by these manufacturers and because of the short life span these manufacturers usually have within the industry. A mandatory standard, applied to these manufacturers, would result in unreasonable costs of investigation and enforcement with almost negligible results — there are too few of these manufacturers to make investigation and enforcement against them worthwhile, and the sporadic entry and exit of these manufacturers in the market eliminates the deterrent effect such a mandatory standard would have against these manufacturers. Finally, imposition and enforcement of mandatory safety standards would be ineffective in eliminating the real risks associated with bunk beds, use of bunk beds by children too young to use bunk beds safely, misuse of bunk beds by children of any age, and inadequate supervision and caution by parents.

The voluntary standards in place were developed through the American Furniture Manufacturer's Association ("AFMA").¹ The CPSC estimates that 106 identified manufacturers comprise the lion's share of the market of bunk beds in the United States.² Of these 106 identified firms, approximately 40% are members of AFMA or were members of the committee that helped to develop the voluntary safety standards." The AFMA estimates that this 40% of the industry manufactures between 75% and 80% of the bunk beds entering the market each year. The 106 manufacturers identified by the CPSC staff in its Notice comprise almost the entirety of the market of bunk beds in the United States.⁴ The CPSC staff currently estimates that all 106 of the manufacturers identified comply with the voluntary safety standards.⁵

The remainder of the domestic bunk bed market is made up of small companies that each year are quickly formed and just as quickly disappear from the market.⁶ *Id.*⁷ The risk of noncompliance with the voluntary industry standard exists with these small companies, which, the

¹ Advance Notice of Proposed Rulemaking, 63 Fed. Reg. 3280, 3281 (January 22, 1998) (hereinafter cited as "ANPR").

² ANPR at 3282.

³ *Id.*

⁴ *Id.*

⁵ ANPR at 3283.

⁶ ANPR at 3282. "While there are likely many other small regional manufacturers or importers of bunk beds in addition to the 106 identified firms, these are not likely to account for a significant share of the U.S. market." *Id.*

CPSC notes, “are normally not associated with industry organizations, and are often unaware of the voluntary standard or misinterpret its requirements.”*

After noting that those manufacturers that comprise almost the entirety of the U.S. market for bunk beds comply with the voluntary standards, and that only those small companies that sporadically enter and exit the market, contributing to a negligible amount of that market, do not adhere to the voluntary standards, the CPSC incongruously concludes that “it is very likely that there will continue to be serious conformance problems with the voluntary standard”⁹ and urges the adoption of a mandatory standard that would allow the CPSC to investigate and prosecute those firms that do not adhere to those standards.” The CPSC believes that making the safety standards in the industry mandatory and controlled by a government agency will intimidate rogue manufacturers, who are currently ignorant of or apathetic toward the voluntary industry standards, into compliance with safety standards.

This reasoning fails for several reasons. First, as the CPSC notes, the manufacturers that, for all intents and purposes, control the U.S. market for bunk beds already comply with the voluntary safety standards. There is no argument for necessity of a mandatory standard against these manufacturers. It seems, then, that the targets of a mandatory standard are the smaller companies that, the CPSC admits, comprise an insignificant share of the market. But yet, noncompliance by these almost anonymous manufacturers is a serious threat, according to the

⁸ *Id.*

⁹ *Id.*

¹⁰ ANPR at 3283.

CPSC, mandating the expenditure of money and time resources to ferret out the nonconforming needles in the haystack.

The CPSC recognizes that these: smaller manufacturers are often not members of any trade organization and may simply be unaware of the voluntary standards.** The CPSC, however, does not propose a method by which the small manufacturers entering the market can be made aware of the mandatory standard in an effective manner. Short of federal licensing for bunk bed manufacturers, there is no feasible way to assure that small manufacturers are made aware of the standards as they enter. The result would be enforcement after noncompliance is discovered, likely as the result of injury or death to a child using the beds. This reactive enforcement would do nothing to further the goal of preventing injury. Further, as illustrated by CPSC recall information, those smaller manufacturers that are caught and whose beds are recalled are often caught too late to do any real good. Of five manufacturers affected by a CPSC recall in November 1996, 2 had already gone out of business by the time the recall was made public.¹² The ineffectiveness of the current enforcement procedures in catching these nonconforming manufacturers before the damages is done gives an indication that enforcement of a mandatory standard would likewise be as ineffective.

If the major players in the bunk bed field are already playing by the rules, and if those small rogue manufacturers cannot be prevented from breaking the rules before it's too late to do

¹¹ *Id.*

¹² "News from CPSC, "<<<http://www.cpsc.gov/spscpub/prerel/prhtml97/97032.html>>>, dated November 27, 1996. Bedder Bunk Co. and Stoney Creek had gone out of business by the release of the November 1996 recall. At the time the recall was announced, the three remaining manufacturers had already modified their designs to comply with the voluntary standard.

any good, the argument for the necessity and usefulness of creating government referees fails.

The same effect is already achieved through the current involvement of the CPSC, consumers and the industry in maintaining the voluntary standards. Periodic inspections by the CPSC or industry members, consumer complaints and reports to the CPSC have resulted in several recalls of bunk beds in the past seven years.¹³ Those recalls further resulted in the removal of nonconforming bunk beds from the market and design modifications to cure those defects.¹⁴ Creation of an enforcement unit and the threat of criminal sanctions holds no threat against companies that have already gone out of business, just as recalls of products by companies that go out of business does little good.

Further, if mandatory standards take a tone similar to that taken by the voluntary standards already in place, such standards will do little to prevent child death and injuries associated with bunk beds. First, as discussed above, enforcement efforts will likely be directed against the small manufacturers entering and disappearing from the market. This would amount to an expensive and time consuming “fishing expedition” to search for noncomplying bunk beds in a market dominated by manufacturers that comply with the safety standards. Second, from the information cited by the CPSC, there is an unreasonable risk of death and injury when children under six years of age use the top bunk of bunk beds. Regulation of the industry will do nothing to prevent parents and other consumers from continuing to use the top bunk for children under six, and, as a result, deaths and injuries will continue to occur.

¹³ A search of the CPSC web page for bunk bed recalls resulted in over 40 entries for publicly announced recalls of metal and wooden bunk beds. See the search engine at <<<http://www.cpsc.gov>>>.

¹⁴ ANPR at 3282.

Of the information provided by the CPSC in its Notice, between January 1990 and September 1997, 85 bunk bed related deaths were reported to the CPSC. Twenty-three of those deaths resulted from hanging — that is, a child was hanged by objects on the bed, like bedding, clothing, etc.-- and those deaths cannot accurately be attributed to any design defects of the beds themselves.” Fifty-four of those deaths resulted from entrapment¹⁶, usually in spaces between the guardrail and the end structures of the bed, in spaces within those structures themselves, or between the end structures and the bed supports.¹⁷ It is only those entrapment dangers that the CPSC discusses in its Notices, and the only risks that can be addressed through a mandatory standard.

It is unclear what the mandatory standard is at this time,¹⁸ but the CPSC estimates that the majority of manufacturers currently comply with that standard.¹⁹ Again, then, it is clear that the mandatory standard would be directed against the smaller manufacturers who typically aren’t

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ In the ANPR, the CPSC states that “the current standard permits guardrails that terminate before reaching the bed’s end structure, provided there is no more than 15 inches between either end of the guardrail and the bed’s closest end structure.” ANPR at 3282. In a press release by the CPSC in November 1996, the CPSC states what appears to be a more restrictive standard, requiring that “in addition to having guardrails on both sides of the top bunk, all spaces between the guardrail and the bed frame, and in the head and foot boards of the the top bunk, should be less than 3.5 inches.” <<<http://www.cpsc.gov/spscpub/prerel/prhtml97/97032.html>>>, “News from CPSC,” dated November 27, 1996.

¹⁹ ANPR at 3283.

aware of the standards currently in place and usually aren't in the market long enough to find out about such standards.

In its cost/benefit analysis,²⁰ the CPSC estimates that the “costs to society” of bunk bed entrapment deaths is approximately \$174 to \$346 per bed.²¹ The costs to manufacturers to bring beds into compliance with the voluntary standard now in place is approximately \$14 to \$50 per bed.²² Without further explanation or elaboration, the CPSC concludes that “[i]f the measure taken to address bunk-bed entrapment (deaths are only 4 to 23 percent effective in reducing those deaths, the costs and benefits of such activity would be about equal. In fact, the Commission expects that a mandatory standard would be substantially more effective than this.”²³

In conducting this cost/benefit analysis, the CPSC neglected to consider two important factors. First, the costs of enforcement of a mandatory standard would likely be substantially equal to, if not in excess of, the current “costs to society” set forth in the Notice. The voluntary standard currently in place is enforced through the interaction of the CPSC, consumers, and members of the industry. This enforcement is reactionary — that is, it appears that action by the CPSC is taken in response to risks reported to the CPSC that have resulted in death or injury to a child. Enforcement of a mandatory standard is intended to be preventative — that is, prevent the entry of dangerous nonconforming beds into the market. The CPSC envisions a cooperative

²⁰ See *id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

effort between the CPSC, state and local officials to identify noncomplying bunk beds and remove them from the market before those beds are sold.²⁴

In conducting its cost/benefit analysis, the CPSC did not take into consideration the expenditure of time and personnel that such a preventative enforcement practice would require. Currently, the CPSC is responding to risks that it has been made aware exist.²⁵ Preventative enforcement would require searching for those nonconforming beds by, the CPSC proposes, use of CPSC personnel along with state and local officials. Considering that all 106 of those manufacturers dominating the market of bunk beds currently comply with those standards, such preventative enforcement would result in a “fishing expedition”, the costs of which would likely exceed the current “costs to society” identified by the CPSC.

Additionally, and without diminishing the tragedy of the death of any child, the expenditure contemplated by the CPSC in implementing and enforcing a mandatory standard must be viewed with regard to the impact it will have. The CPSC urges the necessity of a mandatory standard in light of 51 deaths in a 7 year period -- approximately 7 each year. Almost universally, in each case a child under 3, placed in the top bunk, was the victim. The CPSC currently urges consumers not to allow children under 6 to use the top bunk, and if this warning were heeded, almost all of these deaths could be avoided. A mandatory industry standard can do nothing to prevent injuries and deaths due to misuse of bunk beds by the consumers that purchase them.

²⁴ *Id.*

²⁵ The recall of one bunk bed design responsible for a fatal entrapment accident in 1997, for example, resulted in the recall of 16,500 beds. ANPR at 3282. Other recalls between 1994 and 1997 resulted in the recall of over half a million beds after entrapment hazards caused 34 deaths. “News from CPSC,” <<<http://www.cpsc.gov/cspcpub/prerel/prhtml97/97097.html>>>, April 7, 1997.

Further, out of the 54 entrapment deaths reported to the CPSC, three of those deaths resulted from use of bunk beds that conform to the mandatory standard.²⁶ The voluntary standard has likely been adjusted to meet this newly recognized danger, as it will be with each death that results. However, by their very design, bunk beds present a hazard. Used properly, they can be safe and useful for years. But no limit of safety standards will remove all hazards entirely. Until the CPSC can address or acknowledge the inherent danger associated with use of bunk beds by children under 6, deaths and injuries will continue.

For all the reasons discussed above, the imposition of a mandatory standard and the costly and time-consuming enforcement required to maintain such a standard will do little to promote the goals cited by the CPSC — to eliminate the risks bunk beds pose to children. There is no need to regulate an industry that, for the most part, already complies with safety standards. Further, it is apparent that an unreasonable risk exists whenever a child under 6 uses the top bunk. No amount of regulation of the industry can prevent this inherent risk. Warnings to consumers have been ineffective in preventing these injuries and deaths entirely. The CPSC's efforts would be better channeled into consumer awareness and education. Only when parents are truly aware of the inherent dangers associated with even the safest of bunk beds and take steps to eliminate those risks will bunk bed use become safe for all children.

Holly M. Loy

²⁶ ANPR at 3282.

Before the Department of Commerce
Consumer Product Safety Commission
FR Doc. 98-1457; 63 FR 3280

Comment Regarding Bunk Bed Performance Requirements

Introduction

In its advance notice of proposed rulemaking, dated January 22, 1998, the Consumer Product Safety Commission (CPSC) requested comments concerning a rule mandating bunk bed performance requirements to reduce the risks of injury and death associated with bunk beds. Notice of Proposed Rulemaking, 63 Fed. Reg. 3280 (January 22, 1998). I am in support of the adoption of a mandatory standard.

The first voluntary standard was passed in 1992. Notice of Proposed Rulemaking, 63 Fed. Reg. 3280 (January 22, 1998). Several revisions have been made to the voluntary standard. Since 1992, sixty-three (63) children have died in an accident occurring on a bunk bed. The current voluntary standard is not saving children's lives. CPSP Date Files, January 1990-September 1997, U.S. Consumer Product Safety Commission/EHHA. Deaths have not decreased since the adoption of the voluntary standard.

Bunk bed manufacturers are not complying with the voluntary standard. In the past three years, bunk bed manufacturers have recalled over one-half million bunk beds that did not conform with the voluntary standard. Notice of Proposed Rulemaking, 63 Fed. Reg. 3282 (January 22, 1998). Since the voluntary standard is not enforceable, there is no incentive for the manufacturers to comply with it. The penalties of non-

conformance that accompany the mandatory standard would encourage the manufacturers to comply with it.

Additions need to be added to the proposed rule to provide more protection to the children. A provision should be added to prevent accidents that occur in the space between the guardrail and the end of the bed. Another addition to the mandatory standard should address the openings of the underside of the upper bunk bed.

The voluntary standard has been unable to decrease the risks of injuries associated with bunk beds. The manufacturers fail to appreciate the danger that the bunk bed design creates for children. The mandatory standard would increase the conformance from manufacturers as well as **increase** manufacturers' awareness of this problem. The mandatory standard would be able to protect children from injury more efficiently than the voluntary standard.

Potential Danger to Children

In the past seven years, eighty-five (85) children have died because of the design of a bunk bed. Notice of Proposed Rulemaking, 63 Fed. Reg. 3281 (January 22, 1998). This number may seem small compared to the number of bunk beds sold each year. However, a great number of children are in danger. Around five hundred thousand (500,000) bunk beds are sold each year. Notice of Proposed Rulemaking, 63 Fed. Reg. 3282 (January 22, 1998). Each bunk bed has an average potential useful life of seventeen years. Notice of Proposed Rulemaking, 63 Fed. Reg. 3282 (January 22, 1998). There are currently around seven to nine **million** bunk beds available for use. Notice of Proposed Rulemaking, 63 Fed. Reg. 3282 (January 22, 1998). Considering the facts mentioned

above, millions of children are at risk for injuring themselves on a bunk bed. Whether the number of deaths is eighty-five (85) or five hundred thousand (500,000), the death of a child is not a small loss. Any regulation that can prevent the death of a child should be adopted.

Deaths Have Not Decreased Since the Adoption of the Voluntary Standard

The first voluntary standard was passed in 1992. In 1993, the number of bunk bed related deaths increased by fifteen (15) deaths. Notice of Proposed Rulemaking, 63 Fed. Reg. 3281 (January 22, 1998). A portion of the fatal incidents resulted from hanging and falls, but the majority of deaths involved entrapment. Notice of Proposed Rulemaking, 63 Fed. Reg. 3281 (January 22, 1998). With the exception of three of the accidents, all of the accidents occurred in sections of the bed that did not conform with the current voluntary standard. Many deaths and injuries have been prevented in the beds that conform to the voluntary standard. However, without the compliance by the manufacturers, bunk bed related deaths will not decrease.

Inadequate Compliance with the Voluntary Standard

Ever since, the adoption of the voluntary standard, there has been inadequate compliance by the manufacturers. A study in 1994 showed that seventeen (17) companies were manufacturing bunk beds that failed to comply with the voluntary standard. Notice of Proposed Rulemaking, 63 Fed. Reg. 3282 (January 22, 1998). Also, forty-one (41) manufacturers have recalled over one-half million bunk beds that

failed to conform with the voluntary standard. Notice of Proposed Rule-, 63 Fed. Reg. 3282 (January 22, 1998).

Three years after the adoption of the voluntary standard it was discovered that twelve designs from various manufacturers did not conform with the voluntary standard. Notice of Proposed Rulemaking, 63 Fed. Reg. 3282 (January 22, 1998). Recalls in 1997 resulted in the return of sixteen thousand and five hundred (16,500) beds. Notice of Proposed Rulemaking, 63 Fed. Reg. 3282 (January 22, 1998). The research and the high number of recalls prove that manufacturers are not complying with the voluntary standard.

Costs of Complying with the Mandatory Standard

As the proposal point out, there is little cost to the manufacturers to comply with the mandatory standard. The average price of a bunk bed is three hundred dollars (\$300.00). Notice of Proposed Rulemaking, 63 Fed. Reg. 3283 (January 22, 1998). The Consumer Product Safety Commission suggests that the cost to conform with the mandatory standard falls between fifteen dollars (\$15.00) and forty dollars (\$40.00). Notice of Proposed Rulemaking, 63 Fed. Reg. 3283 (January 22, 1998). Bunk bed entrapment deaths cost society between one hundred seventy-four dollars (\$174.00) to three hundred and forty-six dollars (\$346.00). Notice of Proposed Rulemaking, 63 Fed. Reg. 3283 (January 22, 1998).

Presumably, manufacturers will increase the price of the beds to account for the increase in costs to comply with the mandatory standard. However, the increase of price should not prevent the adoption off the mandatory standard. The cost to society for the

children's deaths is much greater than the increase in price. A child's life is worth a lot more than paying an extra forty dollars. Most likely, parents would not hesitate to pay the extra price if it is used to protect their children.

Manufacturers would also benefit economically from complying with the mandatory standard. As stated above, around one-half million recalls occurred since **1994**. The losses resulting **from** the recalls cost the manufacturer more than it would cost to conform with the mandatory standard.

Manufacturers not only suffer economic loss from recalls but they also suffer the loss of goodwill. When a consumer is notified about a recall, the consumer will usually stop purchasing products from that manufacturer. A recall will create distrust between the consumer and the manufacturer. Consumers will become afraid that the manufacturer's products are unsafe. By conforming with the mandatory standard, the manufacturer will protect itself **from** the potential loss **of** customers and bad publicity that would result from a recall.

justifications for the Mandator-v Standard

Currently, there is no incentive for the bunk bed manufacturers to comply with the voluntary standard. There is no punishment applied to the manufacturers for not complying with the voluntary standard. However, there is a cost to comply with the voluntary standard. Depending on the manufacturer, it would cost between fifteen and forty dollars to bring the bunk bed in conformance with the voluntary standard. That is not a great amount of money for a single bed, but it would cost four million dollars **(\$4,000,000)** to revise one hundred thousand (100,000) beds at a price of forty dollars

(\$40.00). For a great number of manufacturers, safety is not worth spending four million dollars if they are not forced to spend it. This is especially true for the small manufacturers that are only in the market periodically.

The adoption of a mandatory standard would allow the Commission to penalize companies for non-compliance. The threat of fines might be the only incentive for some companies to pay the extra costs to comply. The voluntary standard lacks this enforcement power and threat of punishment. Without this enforcement power, there is a great potential for non-compliance.

An additional incentive for **manufacturers** to comply is that non-compliance would be a violation of law. A violation of the law would severely damage the reputation of the manufacturer as well as the reputation of any retail store selling the bed. The potential damage from violating the law would not only deter manufacturers **from** non-compliance but would also deter a retailer from selling beds that do not comply with the mandatory standard.

Alternative and Additions to the Mandatory Standard

Accidents have still occurred even in beds that conformed with the voluntary standard. Fortunately, only three accidents have occurred in conforming beds. The voluntary standard has dramatically reduced the risks of injury to children. However, the loss of the lives of three children is enough justification to revise the voluntary standard.

In two of the accidents, the children were trapped between the end of the bed guardrail and the end of the bed or the wall. The voluntary standard allows guardrails to end before reaching the end of the bed as long as there is not a space larger than fifteen

inches. Notice of Proposed Rulemaking, 63 Fed. Reg. 3282 (January 22, 1998). This provision is unacceptable. Many children are small enough to crawl through a space of fifteen inches and fall off a bed or get trapped in a space of fifteen inches. Whether it seems feasible or not for a child to do these things, children find ways to become trapped in small spaces.

One solution to this problem would be to add to the mandatory standard a provision stating: “Do not allow guardrails to terminate before reaching the bed’s end structure.” Another suggestion is to add the provision: “If guardrails do not terminate before reaching the bed’s end structure, the space must be less than five inches” (or any appropriate width that it would be impossible for a child to fit through).

The third accident occurred from a child’s head being stuck between the underside of the upper bunk and a structural member. Notice of Proposed Rulemaking, 63 Fed. Reg. 3282 (January 22, 1998). The child was suspended by his head when his feet slipped off the lower mattress. The voluntary standard does not address openings in the upper bunk structure. Such openings have a great potential for hurting a child. When I was a child, I always placed my hands and feet in the openings of the upper bunk while I was lying on the lower bunk. These openings do have a potential for injury and this issue should be addressed.

Some beds are currently designed as such that the holes are covered with material. A provision should be added to the mandatory standard to address this issue. The voluntary standard addresses opening in lower bunk bed end structure. The openings between the underside of the upper bunk and its structural member should be covered or the space should be limited as much as possible. The accident referred to may seem like

an unusual, one-time accident. However, there is no apparent benefit to be gained by not covering the openings. If the additional provision could save a child's life, the revision should be made.

An education campaign would be an excellent supplement to adoption of the mandatory standard. There are many accidents that occur on bunk beds. Many of these accidents can be prevented by precautions taken in the design of the bunk bed. However, there are some potential accidents that cannot be prevented by the design. Children are curious and playful and can get themselves in all kinds of predicaments.

An education campaign would alert parents to the risks associated with bunk beds, especially those that cannot be prevented by design. The majority of parents are probably unaware of all the accidents that have occurred on bunk beds that prompted the need for the mandatory standard. An education campaign would encourage parents to teach their children about the potential dangers associated with bunk beds that cannot be prevented by the mandatory standard. Hopefully, the combination of the mandatory standard and an education campaign will save children's lives.

Conclusion

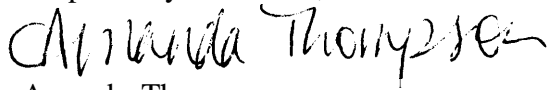
Many people would argue that the deaths of eighty-five (85) children do not justify the involvement of the government into the bunk bed industry. However, if the government does not protect the children by adopting a mandatory standard, the children may not be protected by anyone. Children are unable to assess the risks of their actions. Parents cannot watch their children twenty-four hours a day. However, a manufacturer

can **change** the **design** of a bunk bed and eliminate any unreasonable risk of injury to the children.

The benefits of adopting the mandatory standard outweigh any cost to the manufacturer. Unfortunately, **conformance** will increase the cost of manufacturing each bed. However, the price can be adjusted to reflect the manufacturer's additional cost.

The majority of parents would not hesitate to spend the extra money to protect their child **from** injury. By adopting the mandatory standard, the Commission can require compliance by bunk bed manufacturers and protect children **from** potential accidents in the future.

Respectfully submitted,

A handwritten signature in black ink that reads "Amanda Thompson". The signature is written in a cursive, flowing style.

Amanda Thompson
4831 E. Summit Circle
Apartment 112
Knoxville, TN 379 19

Consumer Product Safety Commission
16 CFR Chapter II
63 FR 3280-01

COMMENT REGARDING THE ADVANCED NOTICE OF
PROPOSED RULEMAKING FOR MANDATING BUNK BED
PERFORMANCE STANDARDS

This comment will address the proposal to initiate rules resulting in the mandating of performance requirements for bunk beds. I believe guidelines and rules governing the construction of bunk beds are beneficial to both the consumer and the manufacturer. The consumer will gain protection **from** the dangers and hazards presently found within the construction of a bunk bed, and the manufacturers will be given an even field in which to fairly market and compete with their product.

I feel there are three important issues to consider in deciding whether or not a rulemaking should occur. Firstly, the members of the bunk bed industry have chosen to disregard the voluntary standard initiated by the trade association in response to the known hazards and dangers of bunk beds. This non-compliance coupled with the fact that bunk bed deaths have not decreased should demonstrate the need for a mandatory standard. Secondly, the statutory authority under which this regulation is promulgated will become an important issue because of any judicial response initiated by the bunk bed manufacturers and the need for a clear and concise standard for the industry to follow. Lastly, additional regulatory options must be explored to make certain adequate safety

information is available to consumers and to assume that consumers are aware of the safety concerns bunk beds pose.

A. The Industry's Disregard for the Voluntary Standard Set by the Trade Association

The industry's disregard for the voluntary standard creates a problem that no longer can be handled through the industry's trade association or any other similar organization. The unique nature of the bunk bed industry, namely the presence of small companies not affiliated with the trade association, requires the industry to step up and corral all these small companies into the association or have guidelines mandated from an outside regulatory body. It seems unlikely that these small companies, whom I expect are aware of the voluntary guidelines and the trade association, will give up their competitive edge, due to lower safety standards, and compete willingly with the larger companies. I feel one of the advantages for the smaller companies is their ability to respond to demand for a specialized product with **efficiency** but with unregulated performance specifications. These companies need to be a target for the rulemaking because the consumers should be protected **from** the uninformed dangers and hazards of bunk beds.

In addition to the smaller companies, there are probably larger companies that assume the risk of injury or death to the consumer and continue to produce bunk beds that are not within the voluntary standards because of the cost-benefit analysis. It would be cheaper to take the risk of injury than to modify their product line. This is the type of business decision I feel yields a need for a mandatory rule with stiff penalties for non-compliance. The mandatory rule needs to increase the benefits of safe construction enough to warrant the manufacturer's compliance by absorbing the cost of the safety

measures into the price of the product. It seems one of the important duties of a regulatory body like the Consumer Product Safety Commission is to warn and protect consumers from manufacturers that are placing priority on profit before consumer safety, especially when the trade association has identified the need for safety guidelines.

As a result of bunk beds being sold with defective designs, there have been a number of recalls for the beds. According to the data compiled by the Commission, the recalls are not very effective. Speaking as a consumer, I have only had experience with a part on my car being recalled. I did not want to spend the time dealing with ordering the part, taking the car to the dealership, and scheduling a time, at their convenience, for the part to be installed. I feel this would be a typical consumer's response to a recall, if the consumer was even aware of the recall at all. According to the Chicago Tribune, April 8, 1997, the number of wooden bunk beds alone that have been recalled since November 1994 is 511,400. *Bunk Beds Recalled over Safety Hazard*, Chi. Trib., Apr. 8, 1997, at 6. With the current likelihood that many bunk beds will never be modified as a result of the recall, there could be thousands of bunk beds today that have a design flaw that could trap a child's head.

Any major design flaw, like: a space large enough for children to get their heads caught in, should be identified and remedied before the bed goes on the market. If the defect is unforeseeable, I understand that a recall may be necessary, but a defect the trade association has identified and attempted to address should not be disregarded until a recall is necessary. A death caused by a known flaw in a design should not be acceptable. Although there will probably always be old bunk beds that do not meet these new

specifications, the first step in solving this problem will be to bring the beds currently in production under safety guidelines.

B. The Statutory Authority for the New Rule

The choice between **promulgating** this new rule under the Consumer Product Safety Act or the Federal Hazardous Substance Act should be based on two main considerations. First, the rule should fall under the Act that most specifically addresses the issue that is being presented for rulemaking. In this case, the Consumer Product Safety Act directly addresses the general concerns of consumer protection with products such as bunk beds. 15 U.S.C. section 2051(a)(1-5) (1997). Congress found that there is a need to protect consumers from unreasonable risks, unanticipated risks, and inadequate control of the manufacturing process. These goals seem to parallel the concerns posed with bunk bed safety. Promulgating the new rule under this act would comport with the act's broad goals and match the stated deficiencies in the current manufacturing safety standards in the bunk bed industry.

Consequently, the Federal Hazardous Substance Act does not seem to be the obvious choice under which to **promulgate** this bunk bed rule. This Act would be restricted to a rule for children and would have to be coupled with a corresponding rule under the Consumer Product Safety Act for adults. The Federal Hazardous Substance Act deals directly with toys and other articles that present a mechanical, electrical or thermal hazard. 15 U.S.C. section 1262(e) (1997). Bunk Beds do seem to present a mechanical hazard, but including bunk beds under this statute seems more attenuated than including them under the Consumer Product Safety Act.

Using different statutes as authority for a rule for children and adults might not be the most concise way to handle this situation and could create discrepancies and inconsistencies. Unless there is a compelling reason, such as much stiffer penalties for violating the Federal Hazardous Substance Act because the violation would involve children, I see no reason to **promulgate** rules under two **different** statutes.

C. Suggestions for Additional Requirements

In addition to current voluntary standards that should become mandatory, I feel that there are several other issues that need to be discussed for potential inclusion in the rulemaking. These additional issues are important for increasing consumer awareness and preventing additional injuries and deaths from manufacturing defects.

The Commission has stated the possibility of adding breadth and scope to the voluntary rules now in place to account for additional safety problems that have arisen from bunk beds meeting the voluntary standards and this consideration seems to be vital to the mandatory standard's success. The voluntary standards are the trade associations and industry's admitted dangers **from** their product. There may be other dangers that the industry has not, as of yet, expressed a willingness to disclose in the form of a voluntary rule. It would seem that these voluntary rules cast the bunk bed industry in a dangerous light, and additional agency analysis and research of other possible dangers is logical because the industry's concerns **might** differ from that of the agency's concerns.

The first consideration **might** be an analysis and possible incorporation of rules that would require a design change to prevent a child from being hung. Death by hanging has been reported in this agency's background material, and at the very least, this danger

should be brought to the consumer's attention. I know that it is unrealistic to **prevent** every possible injury when designing a product, but I do believe this danger needs to be assessed for its prevalence among bunk bed users.

The second consideration could be a clear warning label on the bunk bed and the carton. Currently, there is a warning label placed on the bunk bed and the carton that warns of the mattress size **restrictions**. This would be an inadequate warning if the mandatory standards do not include standards to minimize the risk of hanging. I feel that any death already caused by a bunk bed's construction should be stated in the warning label. The Commission might consider mandating the contents of the warning statement on the warning label and initiating the mandatory publication of an instruction manual with warnings for distribution where bunk beds are sold.

Increasing the public's awareness of the dangers of bunk beds would give consumers the information to incorporate safety into their decision to purchase a bunk bed. In an article for The Commercial Appeal, Memphis, TN,. bunk bed safety suggestions were listed and one suggestion was to "only use a mattress and foundation that me[e]t the manufacturer's specifications." Rebecca Charry, *Bunk Beds Fit any Kid; Be Sure They 're Fit for Safety*, The Corn. Appeal, Mar. 9, 1997, at F3. **This suggestion** illustrates the need for this rulemaking because consumers could be relying **on** manufacturer's specifications that have excluded the voluntary standards set by the industry and have no safety features.

D. Conclusion

The need for a mandatory standard has become apparent because of the non-compliance with the voluntary standards set by the bunk bed industry itself. Since the industry recognizes a need for additional safety measures, this Commission should strongly consider making the voluntary standards mandatory. In addition, I feel the Commission should explore other issues and concerns to be sure the rule is inclusive of all important safety concerns of bunk beds.

Respectfully submitted,

A handwritten signature in black ink that reads "Christen McCammon". The script is cursive and fluid, with the first name "Christen" and last name "McCammon" clearly legible.

Christen McCammon
16 17 Everett Avenue
Maryville, TN 37804

Consumer Product Safety Commission
16 CFR Chapter II
Docket No. 98-1457

COMMENT REGARDING ADVANCED NOTICE OF PROPOSED RULEMAKING
MANDATING BUNK **BED** PERFORMANCE REQUIREMENTS

This comment will address the proposal to create mandatory bunk bed performance requirements to reduce unreasonable risks of injury and death that may be associated with bunk beds. I believe that children represent an especially vulnerable segment of the public and as such must be protected against consumer products that cause unreasonable risks of injury. I support this proposal and feel that the mandatory performance requirements will result in the saving of many children's lives. Furthermore, I feel that the imposition of mandatory rather than voluntary performance requirements is a very rational proposal, that it will not create unreasonable costs for manufacturers who currently do not conform with the voluntary performance requirements, that mandatory standards are consistent with the purposes of both the Federal Hazardous Substances Act ("FHSA")¹ and the Consumer Product Safety Act ("CPSA")², and that arguments against the mandatory standards cannot be well supported.

Mandatory bunk bed performance requirements will save children's lives. The incident data provided within the proposed rule states that from January 1990 through September 1997, 54 children died from entrapment in bunk beds; that data indicated that bunk bed related deaths

¹ 15 U.S.C. § 1261(f) (1988).

² 15 u.s.c § 2051 (1988).

were not decreasing; and that the majority of these deaths involved **entrapment**.³ The data also indicated that except for three exceptions almost all of the incidents of entrapment resulting in death occurred in areas of the beds that did not conform to entrapment provisions in the voluntary **standards**.⁴ Concern was expressed that small regional manufacturers could be unaware of the voluntary standards or the hazards of bunk beds. This proposed regulation would make mandatory bunk bed performance requirements that deal with entrapment and as a result save many children's lives. Considering that bunk beds have an estimated useful life of **13-17** years, requiring mandatory performance requirements now could potentially save the lives of many children in the future. Although the proposal would not prevent every danger associated with bunk beds, it would go a long way towards preventing deaths due to entrapment which constituted **64** percent of the deaths **from 1990** through **1997**.

This proposal is very rational in that it seeks to address the hazards associated with entrapment, which causes the largest percentage of bunk bed related deaths, but does not currently reach into regulating other bunk bed related hazards such as falls or hangings. It is shown that entrapment may be prevented by mandating that spaces between the slats and between the guardrails and frame are no more than 3 ½ inches **wide**.⁵ This is a method of prevention that may be very easily incorporated into a. mandatory standard and is very likely to produce positive results. A standard involving hangings or falls would be more difficult to create. Hangings and falls appear to be incidents that are individually unique and dependent upon differing circumstances. It would be difficult to promulgate a rule which could be applied to every or even

³ 63 Fed. Reg. 3280, 3281 (1998) (to be codified at **16** CFR Chapter II).

⁴ Id. at 3282.

⁵ See Don Oldenburg, Bed **Safety** Standards Are Not A Lot Of Bunk, The Arizona Republic, February **14**, 1998.

a majority of circumstances in which a hanging or fall occurred. I believe the Consumer Product Safety Commission has created a proposal which is tailored to suit an area for which they are certain a mandatory requirements will **have** positive results.

This proposal will not create unreasonable costs for bunk bed manufacturers that are currently not in compliance with the voluntary requirements. Statistics provided in the proposed rule estimate that the most expensive modification for the bed, an addition of a guard rail to the top bunk, would add from \$15-20 or **from** \$30-40 to the retail price of the bed, and the cost of bringing the beds into conformance with entrapment provisions range **from \$15-40 per bed.**⁶ The Consumer Product Safety Commission (CPSC) estimated that the cost to society of bunk bed related deaths was about \$174-346 per bed.⁷ The proposal followed these estimations by stating that even if the entrapment measures were only 4-23 percent effective in reducing deaths the costs and benefits of these measures would be equal but more than likely even more effective. Thus by this analysis alone, mandatory bunk bed performance requirements are cost effective. However, this analysis does not even address other arguments that would also support the implementation of mandatory requirements. One of these arguments would be related to the values and incentives that should be placed upon manufacturers. The bunk bed industry is very competitive and manufacturing firms that do not comply with the voluntary bunk bed standards are able to undercut the costs of manufacturers who do comply. This creates an incentive for manufacturers not to comply with the standards, and thus children's lives are put at risk so that manufacturers can sell more inexpensive bunk beds. This also creates an incentive for the buyer who may be

⁶ 63 Fed. Reg. 3280, 3283 (1998) (to be **codified** at 16 CFR Chapter II).

⁷ **Id.**

unaware of the risks associated with these bunk beds to buy the cheaper nonconforming bed. The Consumer Product Safety Commission must ask itself if these are the values it wants to support in industry. These incentives promote cheaper products at the expense of safety. Requiring the nonconforming manufacturers to comply with mandatory requirements will even out the playing field in the bunk bed industry. Manufacturers currently not in compliance with the voluntary standards will not be put at a great disadvantage, but instead will lose their cost advantage over manufacturers already in compliance. Furthermore, since children are a vulnerable segment of the population because of their inability to protect themselves or for the most part make their own consumer choices, their safety should not be endangered in order to cut corners and lower prices.

One argument against the mandatory bunk-bed requirements is simply that they are the creation of yet more government regulation in an era of over-regulation, and are being applied to an industry that is benign, unhazardous, and does not need to be **regulated**.⁸ However, this argument is unsupported for several reasons. First, as previously stated, bunk beds do present a hazard to children and result in death every year. Second, this is the exact type of situation that Congress created acts such as the Consumer Product Safety Act (CPSA) to regulate. Section 205 1 of the CPSA states the Congressional findings and declaration of purpose of the CPSA . In this section, Congress found that “complexities of consumer products and the diverse nature and abilities of consumers using them frequently result in an inability of users to anticipate risks and to safeguard themselves adequately” and that “the public should be protected against unreasonable risks of injury associated with consumer **products**”.⁹ This proposal to create mandatory bunk bed

⁸ See Bruce Fein, Bunk Bed Safety Bunko, The Washington Times, **January 20, 1998**.

⁹ 15 U.S.C. §2051(a)(2)-(a)(3) (1988).

performance requirements is consistent with the purposes of both the FHSA and CPSA. Under the FHSA bunk beds may be regulated¹⁰ because they present a mechanical hazard resulting in an unreasonable risk of injury in an article intended for use by children.” Under the CPSA they may be regulated because they present an unreasonable risk associated with “consumer products” intended for use by children or adults.” As stated in the proposal, bunk beds may be regulated under either of these statutes despite the fact that the industry has adopted a voluntary standard, because there has not been adequate elimination or reduction of the risk and there is not substantial compliance with the voluntary standard. I agree with this assessment because as the statistics have shown many manufacturers are not complying with the voluntary guidelines and as a result children are dying from the hazards associated with bunk beds each year. As discussed, since the proposal pertains to entrapment and not hangings or falls, it avoids over-regulating and limits itself to a specific purpose. Therefore, it is unreasonable to argue that bunk beds are not a subject of sufficient hazard or importance to warrant regulation, or that this is not good policy because this is the exact type of regulation Congress desired to protect the public with through the CPSA and FHSA.

Although this proposal may be issued under the CPSA or the FHSA, I believe the regulation should be issued under the CPSA for both adult and children’s bunk beds in order to avoid confusion. Since both of these statutes were designed to protect consumers it would seem undesirable to create confusion in the consumers by proposing one rule for adult beds and one rule for children’s beds. The creation of two separate rules would require that a specific

¹⁰ 15 U.S.C. § 1261(f)(D) (1988).

¹¹ 15 U.S.C. § 2052(a)(1).

description each type of bed be created to allow manufacturers to know which standard to follow. Parents may desire to buy adult bunk beds for their children for use as they grow older but may be **confused** as to whether the adult bed regulation properly protects the children while they're young. Since one rule may be properly issued for both children's and adult bunk beds under the CPSA it would seem efficient to do so and avoid both potential confusion and **further** specifications for bed types.

Another argument against the mandatory bunk bed performance requirements is that it is unnecessary if parents would properly supervise their children and not put children at a very young age in the top bunk of bunk **beds**.¹² This argument stems **from** the fact that almost all of the entrapment victims were age three or **younger**.¹³ However, I believe this argument is not well supported. First, many parents may be completely unaware of the hazards associated with bunk beds and without a mandatory standard requiring at least a warning label will continue to be **left** in the dark. Second, bunk beds may be an economic and space decision in household with multiple children and few bedrooms and families may have no choice but to put younger children in bunk beds. Third, children should not be punished or put in hazardous conditions just because they have uninformed or "bad" parents. This argument can be compared to that of seatbelts. Even though studies showed that seatbelts saved lives and seatbelts were provided in vehicles, most if not all of the states found it necessary to pass legislation requiring seatbelts be worn rather than leaving it to the voluntary discretion of the driver. This legislation mandated safety on adults rather than allowing their behavior to be voluntary. It follows then that it is not illogical to

¹² See Mary Sheila Gall, Editorial: Federal Regulations Won't Stop Killer Bunk Beds, The Washington Times, January 26, 1998.

¹³ 63 Fed. Reg. 3280, 3281 (1998) (to be **codified** at 16 CFR Chapter II).

mandate requirements that would protect the safety of children who are even more vulnerable than adults rather than leaving it to the discretion of the parent.

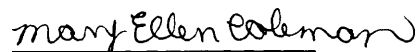
Another argument against this proposal is that regulation is not needed in this area because tort law provides sufficient **remedies** and **deterrence**.¹⁴ Under this argument because strict liability law allows juries to award huge damages against manufacturers who create bunk beds that are unsafe then this is a sufficient deterrent for manufacturers not to produce unsafe beds and regulation is not necessary. Similar to this argument is the argument that if a type of bed is found hazardous it can be recalled. However, I believe that these arguments fall short as well. A large tort settlement appears to be a shallow victory after the death of a child that could have been prevented. This argument would require manufacturers to do a balancing act deciding whether they think they can get away without complying with the requirements, or to decide if it would be cheaper to settle a lawsuit than to comply. Once again this does not seem to be the type of values that should be promoted in industry. Also, recalling a type of bed if it is found hazardous seems to be an expensive and tedious process that may result in missing some dangerous beds. These arguments appear to be very indifferent and unemotional considering this regulation deals with saving children's lives at minimal expense to the industry. Both large settlements and recalls occur after the child is already dead or injured when the hazard could have been prevented.

Children can rarely make their own consumer choices. They do not have years of experience in making informed buying decisions. They typically have no choice in how many bedrooms their home has or what type of bed they sleep in. They are vulnerable. As such they

¹⁴ See Fein, supra note 8.

should be protected against unreasonable hazards associated with consumer products. The FHSA and the CPSA are designed to do just that. This proposed regulation under the FHSA or the CPSA would reduce the hazards associated with bunk beds to small children. Bunk beds are an economical option for some parents and allow creativity in many children who enjoy sleeping in them. Bunk beds should continue to be a consumer option but steps must be taken to ensure the safety for the children who sleep in them. If this proposal is considered inadequate to suit these needs then another proposal would be to make a warning label about the hazards associated with bunk beds mandatory instead of making, guardrails or entrapment provisions mandatory. This way uninformed parents could at least find out the risks associated with bunk beds at a minimal expense to the manufacturer. However, it must be considered that since bunk beds have an expected **useful** life of **13-17** years and many beds may stay in the market used, then a warning label should be affixed in some permanent form and not just on temporary packaging or assembly instructions.

Respectfully submitted,



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Consumer Product Safety Commission
"ANPR For Bunk Beds"
FR Doc. 98-1457
63 FR 3280

**COMMENT REGARDING MANDATORY
BUNK BED PERFORMANCE, LABELING OR INSTRUCTIONS
REQUIREMENTS TO REDUCE THE HAZARDS OF ENTRAPMENT**

This comment will address the proposal to adopt a mandatory safety regulation to address the risk of entrapment associated with bunk beds. My name is Allison Barker, and I am a third-year law student at the University of Tennessee College of Law. I believe that the current voluntary standard should be improved in light of the injuries and deaths involving conforming beds, and I support the proposal to make such standard mandatory in order to effectively address the risk of entrapment.

I understand that the Commission cannot issue a standard under either the Federal Hazardous Substances Act ("FHSA") or the Consumer Product Safety Act ("CPSA") if the industry has adopted and implemented a voluntary standard to address the risk, unless the Commission finds that compliance is not likely to result in the elimination or adequate reduction of such risk or injury, or it is unlikely that there will be substantial compliance with such voluntary standard. I believe the Commission has enough evidence to support findings that compliance has not eliminated or adequately reduced the risk or injuries and that there has not been substantial compliance with the current voluntary standard.

According to the proposed rule, at least three children have died in incidents involving *conforming* beds. To address the shortcomings of the current standard as shown by these deaths, I believe the standard should be changed to require guardrails to run the entire length of the bed rather than allowing gaps of up to fifteen inches between the ends of the guardrails and end structures of the

beds. I also believe that the standard should be changed to address all openings in lower bunk end structures rather than only those that are within nine inches above the sleeping surface of the mattress.

Not only should changes be made to the current standard, but the standard should be made mandatory. I believe the Commission has found enough evidence to support the finding that there is not substantial compliance with the current standard. As I have already discussed, the unreasonable risks and injuries involving bunk beds have not been eliminated or adequately reduced in a timely fashion. The voluntary standards addressing entrapment have existed since 1979. Nevertheless, the Commission's monitoring reveals many manufacturers who simply fail to comply, and recalls involving large numbers of beds are still occurring as deaths and injuries arise. It is not surprising that in such a competitive industry, manufacturers view every regulation as a cost. If a regulation is "voluntary," many will naturally ignore it until it hurts them not to (i.e. they start getting bad publicity from injuries or deaths that have occurred that involve their product). Also, as the Commission points out, there are many small manufacturers which are virtually impossible to effectively monitor who are often either unaware of or misinterpret the requirements under the voluntary standard.

There is no question that the risk of entrapment in bunk beds involves both severe injury and death. In addition, the vulnerability of the injured population is high. A voluntary standard allows manufacturers to build non-conforming beds and even sell them without warning labels or instructions. At best, consumers are made aware of safety flaws only if they happen to hear about a recall. They must then take an additional step of either returning the beds or obtaining special kits so that they can "fix" the beds themselves in order to make them safe. Furthermore, keeping a voluntary standard will mean that there will always be hazardous, non-conforming bunk beds at flea markets and garage sales, where they are often sold once children have outgrown them. A mandatory standard is really the only way to ensure that the number of non-conforming beds at such places will eventually diminish.

I read the “U.S. Consumer Product Safety Commission Regulatory Reform Initiative Summary Report - June 1995” and understand that the Commission strives to work cooperatively with groups that it regulates. This involves reducing the volume of regulations and negotiating voluntary standards. Although I understand the reasons behind these practices, I do not think they are appropriate in cases where compliance cannot be easily and effectively monitored and where more deterrence from noncompliance is needed. In certain industries, such as exercise equipment, the Commission is only dealing with a few major companies that produce all of the equipment. A voluntary standard is appropriate in that scenario because compliance can be monitored easily among a small number of companies and each company risks sticking out like a sore thumb if it fails to comply.

In the bunk bed industry, the Commission identified 106 manufacturers and importers of wooden and metal bunk beds. As noted above, many small companies are formed each year and are usually not associated with industry organizations. Monitoring is difficult and inevitably lacks accuracy. Furthermore, although noncompliance with the voluntary standard can lead to a recall of a company’s product, this has not shown to effectively deter noncompliance in the bunk bed industry.

As the proposed rules suggest, a mandatory standard would allow state and local officials to assist in monitoring, and the publicizing of violations would deter noncompliance. I strongly agree that a mandatory standard would effectively address the eight needs listed under Section E, of the proposed rules.

Another situation where voluntary standards are appropriate is where compliance could cause an undue hardship on smaller companies. However, given the cost/benefit analysis of the current requirements regarding the risk of entrapment, compliance would not place an undue hardship on any manufacturer or importer, regardless of the company’s size. Rather, as the proposed rules suggest, the adoption of a mandatory standard would establish an even playing field for competitors by eliminating

the practice of price undercutting caused by noncompliance. Therefore, although I agree with the preferred practice of having voluntary standards, there are certain situations, especially where the lives of children are at stake, where mandatory standards are the most feasible and effective means of achieving the desired safety of a product

I would also like to note that the 1995 dispute between the Commission and Catalina Furniture (see Appendix A) shows that while the goal of working cooperatively may sound good, it can only be achieved if *both* sides are willing to do so. On May 9, 1995, eleven manufacturers cooperated with the Commission and announced the recall of over 320,000 wooden bunk beds with openings on the top bunk which presented an entrapment hazard. One model of bunk bed manufactured and distributed by Catalina Furniture posed such entrapment hazard, but Catalina refused to be included in the joint recall announcement.

On September 28, 1995, the Commission announced the recall of the model made by Catalina and informed consumers to contact their retailers in order to receive a retrofit kit. In the announcement, the Commission noted that from 1990 to 1994, it had received reports of 24 children who died after becoming caught in bunk beds that posed an entrapment hazard. However, the Commission also stated that it was not aware of any deaths or injuries related to Catalina bunk beds. The Commission stated that it was only aware of one incident involving a Catalina bunk bed where a three year-old child's head became entrapped between the guardrail and the mattress. The child was rescued and sustained no injuries. The Commission did point out that Catalina does attach warning labels to its bunk beds advising that children under age six should not be placed in the top bunk. The Commission stated that the recall applied to Catalina Model No. 3892 bunk beds manufactured prior to January 1, 1995, which did not conform to the voluntary standard requiring any spaces between the guardrail of the top bunk and the bed frame to be less than 3.5 inches. The Catalina bunk beds in

question had spaces of 5.5 inches.

Shortly following the Commission's announcement, Catalina issued a press release claiming the Commission's announcement "inappropriately and inaccurately implie[d] that Catalina's bunk beds are unsafe." In the process of trying to justify its failure to comply with the voluntary standard, Catalina ended up admitting that three deaths reported involved bunk beds with spacing equal to or smaller than Catalina's. As the Commission properly pointed out in its response, the standard is meant to prevent death and injuries even when warning labels and instructions, which often fail to adequately protect consumers, accompany the product.

The dispute with Catalina is a good example of how a company's goals compared to the Commission's goals are not compatible enough to allow cooperative negotiation. The Commission attempts to prevent deaths and injuries *before* they occur.' A company, on the other hand, too often focuses solely on the bottom line, and is willing to incur "safety" costs when it is presented with an actual victim or bad publicity. Furthermore, the Catalina dispute provides a telling example of how a voluntary standard allows a company to avoid bad publicity by refusing to cooperate in recall efforts and then going on the defensive when the Commission reports the recall. If a company refuses to follow a mandatory standard, on the other hand, they risk the consequence of being publicized as having committed a violation and being subject to a mandatory recall. A company would have to first prove there was no violation at all before it could criticize the Commission as Catalina did.

As the proposed rule points out, a consumer product with unreasonable risks of injuries can be regulated under CPSA sec. 3(a)(1) regardless of whether the product is intended for use by children or

¹ "When your intelligence tells you that something will create an injury and that it seems conceptually clear that an injury will occur, it is primitive to wait until a number of people have lost their lives, or sacrificed their limbs before we attempt to prevent those accidents." Forester v. Consumer Product Safety Commission, 559 F.2d 774,789 (D.C. Cir. 1977) (quoting Arnold Elkind, Chairman of the National Commission on Product Safety, S. Rep. No. 91-237, 91st Cong., 1st Sess. 2-3 (1969)).

adults. However, under sec. 30(d), if such risk can be decreased to a sufficient extent by action under FHSA, regulation under CPSA can occur only if the Commission issues a rule that it is in the public interest to do so. The Commission is faced with the choice of (1) issuing a rule under FHSA for bunk beds intended for use by children and a separate rule under CPSA for bunk beds intended for use by adults, or (2) issuing a rule for all bunk beds under CPSA and a rule under sec. 30(d) that it is in the public interest to do so. I believe the Commission should choose the latter option.

The proposed rule suggests that bunk beds intended for use by children would probably be those that have smaller than twin-size mattresses or incorporate styling or other features especially intended for use or enjoyment by children. My brother and I had bunk beds when we were little, and I have bought bunk beds for my seven year-old son. I do not recall ever seeing bunk beds with smaller than twin-size mattresses. In addition, many bunk beds are pretty plain with no special styling or features. Frankly, I do not think a workable distinction can be drawn between bunk beds intended for use by children and those intended for use by adults. I believe that the case of Forester v. Consumer Product Safety Commission* offers some guidance on this issue.

The Forester court was quick to point out that “despite the negative language of [sec. 30(d)], it broadens the CPSC's jurisdiction under the CPSA by permitting it in its sound discretion to regulate products under that Act which formerly would have been subject to regulation exclusively under the FHSA or other acts.”³ The petitioner argued that the distinction between bicycles intended for children and bicycles intended for adults is easy to make, claiming that those intended for use by children are small and primarily cheap.⁴ However, the Commission argued that there is no precise way of

² Forester v. Consumer Product Safety Commission, 559 F.2d 774 (D.C. Cir. 1977).

³ Id. at 784, fn 11.

⁴ Id. at 784.

distinguishing between those bicycles intended for use by children and those intended for use by adults.’

The Commission noted that a large percentage of bicycles produced are light-weight, relatively expensive and sophisticated bicycles which are bought by adults for commuting, touring, and other recreational purposes.⁶ These same bicycles can be and are used by children and adolescents. Furthermore, neither the manufacturer nor the retailer can accurately predict who the subsequent user will be, nor can the seller predict whether the adult purchaser will be the exclusive user or whether the purchaser will give the bike to a child or share it with a child, or later sell it to a parent for a child’s use.⁷ The court held that intent should be determined based upon the reasonable foreseeability of the result by one’s actions and not upon incidental use.* However, the Court ultimately held that the determination of “intent” is vested in the sound discretion of the Commission.⁹

If bunk beds intended for use by children is defined as having smaller than twin-size mattresses or incorporate styling or other features especially intended for use or enjoyment by children, I fear that a significant number of bunk beds that are primarily used by children and adolescents will be excluded. Many bunk beds that I have seen have twin or full size mattresses and come in various styles and with various features, and are used by children, teenagers and even college students. Therefore, like bicycles, except for a narrowly excluded class, it is impossible to draw a distinction between bunk beds intended for use by children and those intended for use by adults.

A mandatory rule should be issued under the CPSA for bunk beds and a rule under sec. 30(d)

⁵ Id.

⁶ Id.

⁷ Id. at 785.

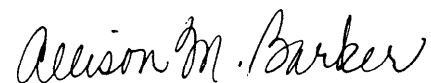
⁸ Id. at 786.

⁹ Id.

that it is in the public interest to do so. A distinction is too hard to draw and risks leaving out too many bunk beds that are used by both children and adults. Furthermore, a single rule under the CPSA would prevent confusion among manufacturers, retailers and consumers. I believe that these reasons provide sufficient support that it is in the public interest for the Commission to issue such a rule under the CPSA.

To summarize, I believe that the current voluntary standard should be improved in light of the injuries and deaths involving conforming beds, and I support the proposal to make such standard mandatory in order to effectively address the risk of entrapment. I believe the best and less confusing way of doing this is to issue a rule under the CPSA for all bunk beds along with a rule under sec. 30(d) that it is in the public interest to do so.

Sincerely,

A handwritten signature in black ink that reads "Allison M. Barker". The signature is written in a cursive, flowing style.

Allison M. Barker

FOR IMMEDIATE RELEASE
CONTACT: Rick Frost
(301)504-0580, Ext. 1166
September 28, 1995
Release # 95-175

CPSC ANNOUNCES RECALL OF CATALINA FURNITURE WOODEN BUNK
BEDS

WASHINGTON, D.C. - The U.S. Consumer Product Safety Commission is announcing a recall program to retrofit approximately 5,000 wooden bunk beds manufactured and distributed by Catalina Furniture Company Inc. of Fullerton, Calif.

The bunk beds have openings on the top bunk, which may present an entrapment hazard to young children. The spaces can be large enough for a child's body to pass through, but small enough to entrap the child's head. The program affects Catalina Model No. 3892 bunk beds manufactured prior to January 1, 1995.

On May 9, 1995, in cooperation with CPSC, 11 manufacturers announced the recall of over 320,000 wooden bunk beds for similar entrapment hazards. At that time, CPSC also identified the potential entrapment hazard with the Catalina Model 3892 bunk bed. However, Catalina refused to be included in that joint bunk bed recall announcement.

From 1990 through 1994, CPSC received reports of 24 children who died after becoming caught in bunk beds that posed an entrapment hazard. Sixteen of the deaths resulted from entrapment between the guardrail and mattress, or guardrail and bedframe. Nineteen of the children were ages two and under, and four were three years of age. Catalina's bunk beds are accompanied by warning labels advising that children under age six should not be placed in the top bunk. CPSC and Catalina continue to urge parents and caregivers not to put children under age 6 on the top bunk.

Although CPSC is not aware of any deaths or injuries related to Catalina bunk beds, the Commission is aware of one incident in which a three-year-old child slipped between the guardrail and mattress of a Catalina Model No. 3892 bunk bed and became entrapped by the head. The child was rescued and did not sustain any injuries.

The ASTM voluntary standard for bunk beds requires that any spaces between the guardrail of the top bunk and the bed frame, and in the head and foot boards on the top bunk, be less than 3.5 inches. This standard has been set to reduce the possibility that a child's head might become trapped in the spaces between the bunk bed supports. The space between the guardrail of the top bunk and the bedframe of Catalina Model No. 3892 bunk beds manufactured prior to January 1, 1995 is 5.5 inches. Catalina has redesigned its Model No. 3892 bunk beds so that beds manufactured after January 1, 1995 comply with the ASTM standard.

Consumers who own a Catalina bunk bed Model No. 3892 should contact the retailer where the bed was purchased or contact Catalina Furniture at (714) 523-7000 for a kit that will reduce the size of the spaces in the Catalina bunk beds.

The U.S. Consumer Product Safety Commission protects the public from the unreasonable risk of injury or death from the 15,000 consumer products under the agency's jurisdiction. To report a dangerous product or a product-related injury, consumers should call CPSC's toll-free hotline at (800) 638-2772. A teletypewriter for the hearing or speaking impaired is available at (800) 638-8270. Consumers can obtain recall information and report product hazards using the INTERNET at info@cpsc.gov.

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Approved: A

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The Consumer Product Safety Act (section 6(b)) requires the Commission to include Catalina's comments with this press release. The Commission staff responded, point-by-point, in writing, to Catalina. The staff stands by the accuracy of every statement in the press release. Catalina's comments and a summary of the staff's response follow:

NOTICE TO ALL PRINT AND BROADCAST MEDIA:

Catalina Furniture Co., Inc. believes that much of the information disclosed in this press release is inaccurate and unfair to Catalina in the circumstances. As such, Catalina believes that CPSC has violated the provisions of the Consumer Product Safety Act by issuing this press release, and Catalina is considering taking legal action against CPSC for violating the Consumer Product Safety Act and for libel and defamation. CATALINA WILL ALSO CONSIDER LEGAL ACTION FOR LIBEL AND DEFAMATION AGAINST ANY PRINT OR BROADCAST MEDIA WHICH PUBLISHES THE CPSC'S DISCLOSURES WITHOUT QUALIFYING SUCH DISCLOSURES BASED ON THE COMMENTS SET FORTH BELOW. IN PARTICULAR, CATALINA WILL TAKE LEGAL ACTION FOR LIBEL AND DEFAMATION AGAINST ANY MEDIA WHICH STATES, SUGGESTS OR IMPLIES THAT ANY PRODUCT MANUFACTURED OR DISTRIBUTED BY CATALINA IS UNSAFE OR WHICH ASSOCIATES ANY PRODUCT MANUFACTURED OR DISTRIBUTED BY CATALINA WITH ANY REPORT OF INJURY OR DEATH.

The press release inappropriately and inaccurately implies that Catalina's bunk beds are unsafe. For example, the second sentence of the first paragraph of the draft press release asserts, "The bunk 'beds have openings on the top bunk which may present an entrapment hazard to young children." This statement is not true of Catalina's bunk beds, provided consumers use the bunk beds properly and in accordance with the warning labels which Catalina provides with its bunk beds. Catalina has not received one single report of any injury associated with any of its bunk beds. This demonstrates that Catalina's bunk beds, including its Model No. 3892 bunk beds, are completely safe, provided consumers follow Catalina's simple instructions and good, old-fashioned common sense in using the bunk beds.

However, CPSC has recommended that, because a very small number of consumers ignore warning labels and refuse to follow manufacturers' instructions, that manufacturers adopt the ASTM voluntary standards for bunk beds. Catalina has agreed to comply with this standard for all beds manufactured after January 1, 1995, and, in addition, Catalina voluntarily commenced a program in December 1994 to retrofit its existing Model No. 3892 bunk beds at no cost to the consumer. Beginning in December 1994, Catalina contacted every single one of its dealers and asked them to offer a free retrofit kit to every purchaser of Catalina's Model No. 3892 bunk bed. Already nearly half of the approximately 5,000 consumers who purchased Catalina's Model No. 3892 bunk bed have taken advantage of Catalina's free retrofit offer.

The CPSC's press release frequently refers to the "recall" of wooden bunk beds and to "recalled beds," thereby implying that Catalina's bunk beds have been the subject of a mandatory recall order. This is inaccurate. The term "recall" is apparently the CPSC's bureaucratic shorthand to describe the voluntary retrofit program which Catalina has undertaken over the last nine months. No mandatory recall order has been issued, nor does Catalina believe it necessary for consumers to return their Model No. 3892 bunk beds. Instead, Catalina suggests that concerned consumers should avail themselves of the free retrofit kits which Catalina has been offering over the last several months.

The CPSC states in its press release that it has received reports of 24 children who died between 1990 and 1994 after becoming caught in bunk beds that posed an

1994 after becoming caught in bunk; beds that posed an entrapment hazard. However, the press release fails to state that virtually all of these reports involved either homemade beds or beds having openings in the top bunk which were larger than the openings of the top bunk of Catalina's Model No. 3892 bed or in which the size of the openings was unknown. CPSC has actually received reports of only 3 deaths involving children who allegedly died after becoming entrapped in bunk beds having openings equal to or smaller than the openings in the top bunk of Catalina's Model No. 3892 bunk bed (before its redesign). Each of these deaths involved beds manufactured by producers other than Catalina, and each of these deaths involved children two years of age or younger. For many years, Catalina has warned consumers of its bunk beds not to allow children under the age of six years to use the top bunk. BUNK BEDS ARE NOT CRIBS, and Catalina

again urges consumers not to place very young children in the top bunk of a bunk bed under any circumstances.

CPSC's description of an incident involving a three-year-old child who allegedly slipped between the guardrail and mattress of a Catalina Model No. 3892 bunk bed omitted several important details about the incident. The bed had been partially disassembled by its owner. The owner apparently used a mattress which was smaller than the mattress recommended by Catalina on the warning label which was attached to the bed or improperly installed the mattress. The owner also ignored Catalina's warning not to allow children under the age of six years to use the top bunk. The alleged incident never would have occurred if the owner of the bed had followed the instructions on Catalina's warning label. Catalina regrets that the alleged incident occurred and is grateful that the child was not injured, but Catalina is certain that the incident could have been avoided if only the owner of the bed had followed the instructions on the warning label.

Finally, the press release fails to note that Catalina refused to participate in CPSC's May 9, 1995 press release because that press release, like the release issued by CPSC today, was inaccurate and unfair to Catalina in the circumstances and therefore constituted a violation of the Consumer Product Safety Act -- the very Act which CPSC is charged to enforce.

For further information and comments regarding Catalina's views about CPSC's press release today, please contact Worth Oelschlager, President and Chief Executive Officer of Catalina at (714) 523-7000.

CPSC Staff Response to Catalina Comments
Sept. 28, 1995

"The press release inappropriately and inaccurately implies that Catalina's bunk beds are unsafe."

CPSC figures show that from 1990 to 1994, 24 children died after becoming caught in bunk beds that posed an entrapment hazard. Sixteen of these entrapment deaths were in the spaces between the guardrail and mattress, or guardrail and bedframe. Where the size of the spaces were reported to CPSC, they ranged from 3.75 to 6.25 inches. The spaces in the Catalina model being recalled for repair are 5.5 inches -- two inches larger than the gap set in the ASTM voluntary standard,

"Catalina's bunk beds, including its Model No. 3892 bunk beds, are completely safe, provided consumers follow Catalina's simple instructions ..."

The recalled beds simply do not meet the ASTM voluntary standard and may present an entrapment hazard to young

standard and may present an entrapment hazard to young children. The standard, like many other mandatory and voluntary standards, is designed to prevent death and injury even when warning labels and instructions accompany the product.

The CPSC release implies that "Catalina's bunk beds have been the subject of a mandatory recall order."

The press release nowhere states that the recall is mandatory. CPSC has had the voluntary cooperation of more than 20 bunk bed manufacturers in announcing recall and repair programs for over 360,080 bunk beds that could pose a safety hazard to children and which, like the Catalina model, do not meet ASTM voluntary standards and may present an entrapment hazard to young children. However, the CPSC is issuing this press release because Catalina has refused to participate in the group effort to publicize the bunk bed recall.

". . . the press release fails to state that virtually all of these reports involved either homemade beds or beds having openings in the top bunk which were larger than the openings of the top bunk of Catalina's Model No. 3892 bed or in which the size of the openings was unknown."

Only 5 of the 24 bunk bed entrapment deaths reported involved homemade bunk beds. CPSC data show that an opening in bunk beds greater than 3.5 inches poses an entrapment hazard to children. The Catalina model in question has an opening of 5.5 inches -- two inches larger than the 3.5 inch maximum opening set in the ASTM voluntary standard. Where the sizes of the openings in the bunk beds involved in the deaths were reported to CPSC, they ranged from 3.75 to 6.25 inches.

The danger of an opening of 5.5 inches is pointed out by Catalina, which acknowledges that three children have reportedly died in bunk beds with spacing equal to or smaller than Catalina's. The CPSC attempts to recall products before any deaths or injuries occur. Three preventable deaths represents a serious situation requiring immediate action.

"CPSC's description of an incident involving a three-year-old child who allegedly slipped between the guardrail and mattress of a Catalina Model No. 3892 bunk bed omitted several important details about the incident."

No relevant details were omitted. The child in the Catalina bed became trapped when he slipped between the guardrail and the mattress. Conformity with the ASTM voluntary standard is designed to prevent such incidents, no matter what the mattress size. As demonstrated by this incident, warning labels and instructions often fail to adequately protect people.

"...CPSC has violated the provisions of the Consumer Product Safety Act..."

CPSC has followed both the spirit and the letter of the law. The CPSC has been careful and thorough in this release, and has reached a voluntary, cooperative agreement with more than 20 other bunk bed manufacturers on a similar release.

092895,CPSC ANNOUNCE RECALL OF CATALINA FURNITURE WOODEN BUNK BEDS, OPENING ON TOP OF BED PRESENT ENTRAPMENT HAZARD

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